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June 10, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Notice, CG Docket No. 02-278

Dear Ms. Dortch:

Please accept for filing this *ex parte* notice and comments by salesforce.com, inc. ("Salesforce") and its subsidiary ExactTarget, Inc. ("ExactTarget") regarding the recently released summary of Chairman Wheeler's proposed declaratory ruling(s) intended to resolve more than 20 pending petitions on this docket.[1]

Salesforce is a global cloud computing company headquartered in San Francisco, California. ExactTarget operates on-demand software-as-a-service offerings, including web based platforms that allow retailers and other businesses to send personalized text messages to consumers who have provided their cell phone numbers for that purpose. Although these platforms do not dial any telephone numbers and therefore are in no way equivalent to the "automatic telephone dialing systems" Congress addressed when it enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") in 1991, plaintiffs' class action attorneys have asserted that the ExactTarget system is an "automatic telephone dialing system." Salesforce and ExactTarget therefore have significant interests in the anticipated declaratory ruling(s) summarized in Chairman Wheeler's Fact Sheet published on the Commission's website on May 27, 2015. While the contents of the full proposed declaratory ruling(s) have not been released to the public, two aspects of the Chairman's summary raise serious concerns for operators of text messaging platforms like ExactTarget.

[1] *See Fact Sheet on Consumer Protection Proposal* at 1, FCC (May 27, 2015), https://www.fcc.gov/document/fact-sheet-consumer-protection-proposal ("Fact Sheet"). Salesforce and ExactTarget request that this letter be included in the administrative record for the pending petitions addressed in the Chairman's proposal.

Definition of Automatic Telephone Dialing System.

In enacting the TCPA, Congress did not seek to regulate all calls to cell phones using any automated equipment. Instead, Congress enacted a statute that prohibits only such calls made using an "automatic telephone dialing system," which Congress specifically and narrowly defined as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §§ 227(b)(1)(A)(iii); 227(a)(1).

When the TCPA was enacted in 1991, Congress was concerned about the use of dialing systems that could create and dial random or sequential phone numbers. Because such systems could be used to call random telephone numbers, or sequential blocks of telephone numbers (such as 212-555-0001, 212-555-0002, 212-555-0003, and so forth), they often tied up multiple business lines, and reached emergency or unlisted numbers.[2] This history reflects that Congress was concerned with calls made using a very specific type of telemarketing equipment in use at the time the statute was passed—equipment that includes a random or sequential number generator as a source of phone numbers to be dialed. Thus, to qualify as an ATDS, the equipment at issue must have the capacity to dial random or sequential telephone numbers created by a random or sequential number generator.

Chairman Wheeler's Fact Sheet states with respect to the definition of an ATDS (which he refers to as an "autodialer") that it "is any technology with the *capacity* to dial random or

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[2] *See, e.g.*, H.R. Rep. No. 102-317, at 10 (1991) ("Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers."); S. Rep. No. 102-178, at 1-2 (1991) (expressing concern that telemarketers might "dial numbers in sequence, thereby tying up all the lines of a business and preventing outgoing calls," and noting that "[h]aving an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially"); H.R. Rep. No. 101-633, at 3 (1990) ("[ATDS] often are programmed to dial sequential blocks of telephone numbers, including those of emergency public organizations and unlisted subscribers."); *see also Telephone Advertising and Consumer Rights Act and Telephone Consumer Privacy Rights Act: Hearing on S.1410 and S. 1462 Before the Subcomm. on Communications of the S. Comm. on Commerce, Science, and Transportation*, 102nd Cong. 45-46 (1991) (Statement of Thomas Stroup, President, Telocator) (reflecting concerns with the use of a random or sequential number generator because of the potential accidentally to generate false pages to those on the organ transplant waitlist); *Telephone Advertising and Consumer Rights Act and Telephone Consumer Privacy Rights Act: Hearing on H.R. 1304 and H.R. 1305 Before the Subcomm. on Telecommunications and Fin. of the H. Comm. on Energy and Commerce*, 102nd Cong. 112-113 (1991) (statement of Michael J. Frawley, President, Gulf Coast Paging, on behalf of Telocator) ("[S]equential calling by automatic telephone dialing systems can effectively saturate mobile facilities, thereby blocking the provision of service to the public.").

sequential numbers."[3] To the extent that this statement means technology that has the capacity to create random or sequential telephone numbers using a random or sequential number generator and dial such numbers, it appears to be consistent with Congress' statutory ATDS definition. However, the Fact Sheet goes on to state that "[t]he rulings would ensure robocallers cannot skirt consumer consent requirements through changes in calling technology design or by calling from a list of numbers."[4] This suggests that the proposals may seek to define ATDS more broadly than Congress did, to cover any system that could be reprogrammed to send text messages to random or sequential phone numbers (*i.e.*, with the potential capacity as opposed to present capacity specified by Congress) as long as it can send text messages to lists of phone numbers. Any such definition would be contrary to Congress' plain language. And any ATDS definition that would cover any system with the ability to dial (or send text messages to) lists of phone numbers without manual dialing, regardless of its capacity to generate and dial random or sequential telephone numbers, would be contrary to Congress' language, outside the FCC's authority, and render the TCPA unconstitutional.

First, Congress' ATDS definition uses the present tense "has the capacity" to store or produce and dial telephone numbers "using a random or sequential number generator." 47 U.S.C. § 227(a). The Commission must give effect to Congress' language, including its use of the present tense and the "using a random or sequential number generator" clause.[5] Indeed, the Commission has no authority to change Congress' TCPA definitions.[6] This is why the Commission incorporated them into its first regulations implementing the TCPA.[7] Applying Congress' plain language, numerous courts have recognized that what matters for purposes of

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[3] Fact Sheet at 1 (emphasis in original).

[4] *Id.*

[5] *See La. Pub. Serv. Comm'n v.* FCC, 476 U.S. 355, 376 (1986) ("As we so often admonish, only Congress can rewrite [a] statute."); *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes.").

[6] *Compare* 47 U.S.C. § 227(a) (definitions section with no grant of authority) *with id.* 227(b)(2) and (c)(2) (granting FCC authority to prescribe regulations to implement those two subsections of the TCPA); *see Marks* v. *Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291 (S.D. Cal. 2014) ("The Federal Communications Commission ('FCC') does not have the statutory authority to change the TCPA's definition of an ATDS.").

[7] *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, at ¶ 6 n.6 & Appx. B (Sept. 17, 1992) ("All terms except 'established business relationship' are defined in the TCPA (see § 2279a)); we have incorporated those statutory definitions in our rules."); 47 C.F.R. § 64.1200(f)(2).

determining whether a system is an ATDS is whether it has the *present* capacity to store or produce and dial phone numbers using a random or sequential number generator.[8] If all that were required to be an ATDS were a potential through modification to create and dial random or sequential telephone numbers, then any computerized device would be an ATDS.

Second, expanding the scope of the ATDS definition to cover any system that can send text messages to lists of stored telephone numbers without manual dialing would (in addition to being contrary to the plain text of Congress' ATDS definition and outside of the FCC's authority) render the TCPA constitutionally overbroad. Virtually every smartphone today has this capacity. For example, there are numerous ways to import contact lists into an iPhone.[9] An iPhone user also can create lists or groups of contacts.[10] And the iPhone has a functionality that enables users to create a text message and send it to multiple recipients, including pre-created groups of numbers, at the same time.[11] Thus, if the Commission defines an ATDS as any system with the capacity (actual or potential) to dial or text stored lists of numbers without manual dialing, every iPhone would be covered by the TCPA. Such a definition would mean that millions of text messages sent every day would violate the TCPA since people regularly call and text others without first obtaining prior express consent. A mother would violate the TCPA by calling or texting a friend's babysitter to see if she was interested in a job. A union leader would violate the TCPA by notifying members of an upcoming meeting via a group text. Given the extensive use of cell phones today, a massive amount of protected non-commercial speech would be prohibited, thereby rendering the TCPA unconstitutionally overbroad.[12]

Indeed, Congress' limitation of the ATDS definition to equipment with specific and narrow capacities is what has saved the TCPA from constitutional overbreadth challenges. For

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[8] *See, e.g., Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193-94 (W.D. Wash. 2014) (system must have a "present, not potential, capacity to store, produce, or call randomly or sequentially generated telephone numbers" to qualify as an ATDS); *Dominguez v. Yahoo!, Inc.*, 8 F. Supp. 3d 637, 643 n.4 (E.D. Pa. 2014) (same).

[9] *See* https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=iphone%20how%20to%20import%20contacts (last visited June 8, 2015) (search results with numerous articles explaining how to import contacts into an iPhone).

[10] *See https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=how%20to%20make%20a%20contact%20group%20on%20iphone* (last visited June 8, 2015) (search results with numerous articles explaining how to create a group of contacts on an iPhone).

[11] *See* http://support.apple.com/en-us/HT202724 (last visited June 8, 2015).

[12] *See, e.g., Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

example, in one case the defendant argued that the TCPA was unconstitutionally overbroad because most smartphones and computers qualified as an ATDS.[13] The court rejected this argument, citing cases that have construed the ATDS definition as requiring a present capacity to store or produce numbers using a random or sequential number generator and to dial such numbers.[14] Significantly, the United States filed a brief supporting the position that the TCPA is not overbroad in which it endorsed an interpretation of ATDS that requires a "present capacity, at the time the calls were being made, to store or produce and call numbers ***from a number generator.***"[15]

For these reasons, Salesforce and ExactTarget urge the Commission to stay true to the words used by Congress, and the definition endorsed by the United States in supporting the constitutionality of the TCPA.

One Call Exemption for Reassigned Numbers.

While Salesforce and ExactTarget appreciate that the Chairman's Fact Sheet seems to propose a limited safe harbor for calls to reassigned numbers for which consent had been provided, there is no indication as to whether the proposal will interpret the phrase "made with the prior express consent of the called party," and it is unclear how a one call safe harbor would work in the context of text messaging.

Salesforce and ExactTarget urge the Commission to interpret the TCPA's exemption from liability for calls "made with the prior express consent of the called party," 47 U.S.C. § 227(b)(1)(A), to mean calls made with the prior express consent of the party the caller is trying to reach. The TCPA does not define "called party" and Courts have interpreted this phrase inconsistently.[16] Given that Congress intended to create an exemption from liability for the

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[13] *De Los Santos v. Millward Brown, Inc.*, No. 13-80670-CV-MARRA, 2014 U.S. Dist. LEXIS 88711, at *18-19 (S.D. Fla. June 29, 2014).

[14] *See id.* at *19.

[15] Brief of United States at 11 n. 7, *De Los Santos v. Millward Brown, Inc.*, No. 13-80670 (S.D. Fla. Jan. 31, 2014), ECF No. 54 (emphasis added). The United States also filed a brief in support of the constitutionality of the TCPA in another case where it argued that "Congress narrowly tailored the TCPA . . . by prohibiting only . . . [calls] made from equipment with the capacity to (a) store or produce random or sequential telephone numbers to be called and (b) dial such numbers." Brief of United States at 9, *In re Jiffy Lube Int'l, Inc.*, No. 11-2261 (S.D. Cal. Dec. 27, 2011), ECF No. 46 (attached hereto as Exhibit B).

[16] *Compare Cellco P'ship v. Dealers Warranty, LLC*, No. 09-cv-1814, 2010 U.S. Dist. LEXIS 106719, at *34 (D.N.J. Oct. 5, 2010)) (interpreting "called party" in this context to mean intended recipient) *and Leyse v. Bank of*

calling party, it makes sense to interpret the phrase from the perspective of the calling party. The statute makes it unlawful "to *make* any call" other than one "*made* with prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A) (emphases added). At the time a call is being made, the caller cannot be certain to have obtained prior consent from whomever might answer the phone, or whomever might be the current subscriber of the number dialed (who often is not the actual user of the particular number in light of family and business plans). The caller can only know whether or not it has consent from the person that provided the phone number and whom the caller is trying to reach. As many pending petitions and comments have noted, it is impossible for businesses to learn both comprehensively and in real-time whether a given cell phone number has been reassigned to another person. There is no existing third-party vendor that provides an all-inclusive, up-to-date database of reassigned wireless numbers. Even Neustar admits that its service covers only 70% of U.S. cell phone numbers.[17] Thus, in order for businesses to comply with the TCPA, they must be able to rely upon the consent that was given to call a particular number until they have actual knowledge that they are calling a reassigned or wrong number. Any interpretation of "called party" to mean current subscriber would render the TCPA unconstitutional because businesses could not reasonably determine whether a call would be lawful or unlawful before making it, and therefore they would lack adequate notice of what is prohibited.[18] This would lead to an unconstitutional chilling of protected speech given that the

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Am., No. 09-cv-7654 (JGK), 2010 U.S. Dist. LEXIS 58461, at *9-11 (S.D.N.Y. June 14, 2010) (same), *with Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir. 2012) (interpreting "called party" in this context to mean current subscriber). The Seventh Circuit relied on the fact that the term "called party" is used in other provisions of the TCPA where it seems to refer to the current subscriber. *Id.* at 639-40. Since then, however, the Supreme Court has made clear that the assumption that identical words used in different parts of a statute should be given the same meaning "readily yields" where context suggests a different meaning. *Util. Air Regulatory Grp v. EPA*, 134 S. Ct. 2427, 2441 (2014). That is precisely the situation here: given the context of an exemption from liability for calls made by a calling party, "called party" in this provision of the TCPA must mean the party the caller intended to reach.

[17] *See Understanding TCPA: Maximizing Consumer Outreach & Mitigating Risk*, Neustar, Inc., *available at* http://www.neustar.biz/information/docs/whitepapers/understanding-tcpa-law.pdf; *see also* Computer & Communications Industry Association Reply Comments on Stage Stores, Inc. Petition at 2, CG Docket No. 02-278 (Aug. 25, 2014) ("The Neustar database cannot, in its current incarnation, eliminate the risk that a business will send a marketing or informational message to a reassigned mobile phone number. Neustar itself acknowledges that its database does not capture as much as 30% of mobile phone numbers used in the United States." (internal citations omitted)).

[18] *See, e.g., FCC v. Fox TV Stations*, 132 S. Ct. 2307, 2317 (2012) ("laws which regulate persons or entities must give fair notice of conduct that is forbidden or required"; "regulated parties should know what is required of them so they may act accordingly").

provision of the TCPA at issue applies regardless of the content of the message, and imposes strict liability for any violation.[19]

It appears that the Chairman's one call safe harbor would address this problem in the event that the call was a live call to a cell phone number, answered by the current user of the number, and who informed the caller they had the wrong number. It is less clear how the one call safe harbor would work in the context of text messaging. There, the businesses sending the text messages to cell phone numbers provided by consumers at the time they signed up to receive the messages will not know they now have a wrong number unless the text recipient takes some action, or they otherwise learn of a reassignment. A one text to a reassigned number ruling without an added knowledge component does nothing to help businesses that only send text messages to numbers for which they have obtained affirmative consumer consent avoid inadvertently sending text messages to reassigned cell phone numbers. Salesforce and ExactTarget therefore strongly urge the Commission to include an actual knowledge component in any safe harbor it adopts in order to ensure that businesses can continue to send requested communications to consumers without risking liability based on circumstances entirely out of their knowledge and control.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

Tonia Ouellette Klausner

Counsel for Salesforce.com, Inc. and
ExactTarget, Inc.

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[19] *See, e.g. Smith v. California*, 361 U.S. 147, 151 (1960); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992).